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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 319

FIDELITY ASSURANCE ASSOCIATION, A CORPORATION, DEBTOR, AND
CENTRAL TRUST COMPANY, TRUSTEE FOR FIDELITY ASSURANCE ASSOCIATION,

Petitioners,

vs.

EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST VIRGINIA, AND EX OFFICIO INSURANCE COMMISSIONER OF THE STATE OF WEST VIRGINIA;
ROSS B. THOMAS AND H. ISAIAH SMITH, WEST VIRGINIA STATE COURT RECEIVERS;
BANKING COMMISSION OF WISCONSIN;
CHARLES R. FISCHER, COMMISSIONER OF INSURANCE AND PERMANENT RECEIVER FOR DEBTOR CORPORATION IN AND FOR THE STATE OF IOWA;
JOHN B. GONTRUM, INSURANCE COMMISSIONER OF THE STATE OF MARYLAND;
DEWEY S. GODFREY, MISSOURI STATE COURT RECEIVER;
L. H. BROOKE, TRUSTEE, FREDERICK LEAKE AND A. L. GOLDBERG, JR.;
SECURITIES AND EXCHANGE COMMISSION,

Respondents.

BRIEF OF RESPONDENT, JOHN B. GONTRUM, INSURANCE COMMISSIONER OF THE STATE OF MARYLAND, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Counsel for Respondent, John B. Gontrum, Insurance Commissioner of Maryland.

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OPINIONS BELOW.

The opinion of the District Court is printed in the record (R. 3-38) and is reported in 42 Fed. Supp. 973. The opinion of the Circuit Court of Appeals is also printed in the record (R. 363-388) and is reported in 129 Fed. (2d) 442 (Adv. Sheets).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, (U. S. Code, Title 28, Sec. 347 (a)), and Section 24 (c) of the Bankruptcy Act (U. S. Code, Title 11, Sec. 47 (c)). The decree of the Circuit Court of Appeals was entered on June 16, 1942 (R. 387-388). A petition for rehearing was filed on July 13, 1942 (R. 389-396) and was denied on July 22, 1942 (R. 397).

STATEMENT OF THE CASE.

On June 6, 1941, Fidelity Assurance Association filed in the United States District Court for the Southern District of West Virginia a voluntary petition for reorganization under Chapter 10 of the Bankruptcy Act. On the same day, by *ex parte* order, the District Court undertook to require the immediate surrender to a Trustee appointed by it, of approximately twenty millions of dollars of securities which had been deposited by Fidelity Assurance Association with officials of some fifteen states as required by the laws of such states. None of these securities were surrendered and subsequently on August 9, 1941, the turnover order was changed to an injunction (R. 319-334). In the meantime a number of states had intervened and filed answers controverting the Debtor's petition and others had filed motions to strike out the orders of June 6, 1941, and August 9, 1941. Controversial answers had also been filed by creditors and others.

After an extended hearing over a period of four months the District Court filed a lengthy opinion (R. 3-38) and on January 5, 1942, entered an order (R. 39-40) approving the Debtor's petition and overruling the numerous objections interposed by the Respondents. An appeal to the

Circuit Court of Appeals for the Fourth Circuit was filed on March 12, 1942, and that Court, holding that the Debtor was an insurance company and also that the petition had not been filed in good faith, reversed the District Court and remanded the cause with directions to the District Court to dismiss the petition (R. 363-388).

THE FACTS.

It is unfortunate that the Petitioners have submitted to this Court a printed record which, although voluminous, is hardly adequate to present the facts essential to a proper consideration of their petition for certiorari. The record printed by the Petitioners contains much that could have been omitted and yet fails to include the Debtor's petition and the controversial answers; indeed, all the pleadings in the case, with two minor exceptions, are omitted.[1] Fortunately the actual facts (as distinguished from opinion facts or conclusions) necessary to a consideration of the petition for a writ of certiorari are largely undisputed and are fairly well set out in the opinion of the Circuit Court of Appeals.[2] For this reason and also because the essential facts not covered in the brief of the Petitioners are set out in briefs filed by other Respondents, we will

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[1] The Respondents suggested to the Petitioners that a stipulation as to the contents of the record be entered into as required by Rule 38(8) but the Petitioners chose instead to print the appendices to all the briefs filed in the Circuit Court of Appeals. These are disconnected and furnish a mere hodge podge of information for which the Petitioners have not even seen fit to prepare an index. The record certified to the Circuit Court of Appeals contained nearly 4,000 pages of testimony and 113 exhibits. Under the rules of the Circuit Court of Appeals the record was not printed and it was, of course, impossible to print any substantial portion thereof as appendices to briefs. However, a 47-page statement of facts was printed and the briefs were replete with references to and quotations from the complete record, none of which appear in the printed record here.

[2] Evidently the Petitioners also regard the Circuit Court of Appeals' statement of the facts as accurate (Petitioners' Brief, p. 63). Practically all references to the record in support of Petitioners' statement of facts are to the opinion of the Circuit Court of Appeals; in a few instances the opinion of the District Court is referred to. In only one instance have the Petitioners referred directly to the testimony given before the District Court.

not in this brief undertake to include a full statement of facts.

We do wish to point out, however, that the state court proceeding in Maryland is not a receivership proceeding. Under the Maryland statute securities were deposited with and assigned to the Insurance Commissioner in trust for Maryland contract holders.[3] There are no general assets of Fidelity in Maryland and the Insurance Commissioner as trustee is administering the trust created by the Maryland statute under the supervision of a court of equity. While there has been no effort to completely liquidate the securities held in trust in Maryland, there has been a partial liquidation resulting chiefly from redemptions. At the present time about 40% of the trust assets are in cash and the balance is represented by marketable securities, most of which are high grade and quoted at a price considerably in excess of par. These securities have depreciated in value since June, 1941.

As a matter of fact all of the assets deposited with the 14 states other than West Virginia, are readily marketable securities and the only doubtful assets of the Debtor (as to which the Petitioners contend "slow liquidation" is necessary) are concentrated in West Virginia and, if this proceeding were dismissed, they would be administered by only one court, the Circuit Court for Kanawha County, West Virginia.

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[3] The important sections of the Maryland statute are printed in full in the record at pages 203-209. Section 222 (R. 205-206) prohibits the transaction of business in Maryland "unless and until such company shall have assigned to and deposited with the Commissioner, or with some independent trust company approved by him, in trust, as security for all the holders of contracts or other obligations heretofore or hereafter sold, negotiated, issued or accrued in said company in the State of Maryland" approved securities having a market value "at no time less than the aggregate contract liability of the company under all contracts heretofore or hereafter sold in the State of Maryland."

SUMMARY OF ARGUMENT.

The Circuit Court of Appeals for the Fourth Circuit decided two and only two questions, namely: (1) that the Debtor was an insurance company and, therefore, could not file a petition for reorganization under Chapter 10 of the Bankruptcy Act, and (2) that the Debtor's petition was not filed in good faith within the meaning of Section 146 of the Bankruptcy Act and, therefore, should have been dismissed because the interests of creditors would be best subserved in the prior pending state court proceedings, since it was virtually conceded below by all parties, and by the District Court, that reorganization as a going concern was not feasible and that liquidation in some form was inevitable. The Respondents, who were Appellants below, raised a number of other questions, a favorable decision on any one of which would have resulted in the reversal of the order of the District Court, but the Circuit Court of Appeals deemed it unnecessary to pass upon any of these questions in view of its decision on the above two questions.

The Petitioners advance as their reasons for the further review by this Court on certiorari of the two questions decided by the Circuit Court of Appeals, four of the five grounds for the granting of a writ of certiorari set forth in paragraph 5(a) of Rule 38 of this Court. It is the contention of the Respondents that none of these reasons are sound, and in this brief we will make the following points in support of our position.

POINT I. No important question of federal law which has not been but should be settled by this Court was decided by the Circuit Court of Appeals.

1. The decision of the Circuit Court of Appeals that the Debtor was an insurance company at the time

of the filing of the petition for reorganization is not in conflict with the Investment Company Act of 1940. (Petitioners' Point I).

2. The decision of the Circuit Court of Appeals that the Debtor at the time of the filing of the petition for reorganization was an insurance company within the meaning of Section 4 of the Bankruptcy Act does not present a question of federal law which has not been but should be settled by this Court. (Petitioners' Point II).

3. The decision of the Circuit Court of Appeals that the interest of creditors of the Debtor would be best subserved by the prior pending state court proceedings does not present a question of federal law which has not been but should be settled by this Court. (Petitioners' Point VII).

POINT II. There is no conflict between the decision of the Circuit Court of Appeals and the applicable decisions of this Court.

1. There are no decisions of this court as to what is an insurance company within the meaning of Section 4 of the Bankruptcy Act. (Petitioners' Point III).

2. The decisions of this court in *Bowers v. Lawyers Mortgage Company*, 285 U. S. 182; and *United States v. Home Title Insurance Company*, 285 U. S. 191, are not applicable in determining what is an insurance company within the meaning of Section 4 of the Bankruptcy Act. (Petitioners' Point III).

3. Even if such decisions of this court were applicable, the decision of the Circuit Court of Appeals would not be in conflict therewith. (Petitioners' Point III).

POINT III. The Circuit Court of Appeals did not decide an important question of local law in a way which was probably in conflict with applicable local decisions.

1. There are no applicable local decisions on the question of what is an insurance company under the law of West Virginia. (Petitioners' Point IV).

2. The Circuit Court of Appeals correctly and properly applied and interpreted the West Virginia statutes in holding that the Debtor was an insurance company under such statutes at the time of the filing of the petition for reorganization. (Petitioners' Point IV).

POINT IV. There is no conflict between the decision of the Circuit Court of Appeals for the Fourth Circuit and the decisions of other circuit courts of appeals.

1. There is no conflict in the decisions of the various circuit courts of appeals on the question of what is an insurance company within the meaning of Section 4 of the Bankruptcy Act as amended by the Act of 1910. (Petitioners' Point V).

2. The Circuit Court of Appeals held that the Debtor was an insurance company at the time of the filing of the petition for reorganization because: (a) it was classified as an insurance company by the laws of the State of West Virginia, (b) it was classified as an insurance company by the States generally, (c) it had the charter powers of an insurance company, and (d) its activities during the six months prior to the filing of the petition for reorganization were those of an insurance company. In no case where all these factors are combined has any Circuit Court of Appeals held that the company is not an insurance company. The decision of the Circuit Court of Appeals is, therefore, not in conflict with a decision in any other circuit. (Petitioners' Point V).

3. The Circuit Court of Appeals referred to the contention of the Petitioners that "slow and orderly liquidation" was a method of reorganization under Chapter 10 of the Bankruptcy Act but it did not decide the question and it did not hold that reorganization means only rehabilitation as a going concern. (Petitioners' Point VI).

ARGUMENT.

POINT I.

NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT WAS DECIDED BY THE CIRCUIT COURT OF APPEALS.

1.

No Conflict With Investment Company Act Of 1940.

The Petitioners argue that Congress has expressly recognized that face amount certificate companies are subject to the Bankruptcy Act because the Investment Company Act of 1940 amends certain sections of the Bankruptcy Act making special provisions with reference to procedure in the bankruptcy of face amount certificate companies. They further argue that the Debtor is a face amount certificate company and not an insurance company as those terms are defined in the Investment Company Act of 1940. On these two premises the Petitioners contend that the Circuit Court of Appeals erred in classifying the Debtor as an insurance company. This point was never suggested to the lower court and is raised for the first time here, but the complete fallacy of the argument as applied to the present case is apparent from the opening paragraph of the argument in Petitioners' brief (Brief p. 19), wherein the Petitioners state that they are only considering the corporate powers and the business activities of the debtor during the period from 1912 to December 31, 1940, without reference to either the corporate powers or the business activities of the Debtor on and after January 1, 1941.

The Respondents do not contend that investment companies or face amount certificate companies are excluded from the provisions of the Bankruptcy Act. Likewise, the Respondents do not contend and the Circuit Court of Appeals did not hold that prior to December 31, 1940, the Debtor was an insurance company and not an investment company or face amount certificate company. On the contrary, the Respondents contended below and the Circuit Court of Appeals held that by virtue of its charter powers and its corporate activities and its classification by the State of West Virginia, and by the States generally, the Debtor *on and after January 1, 1941*, was an insurance company and as such excluded from the Bankruptcy Act. Since the petition for reorganization was filed on June 6, 1941, the character of the debtor corporation as of that date is the controlling factor and it avails nothing to say that as of a date more than six months prior to the date of the filing of the petition the Debtor was not an insurance company, if in fact it was such at the time the petition was filed. No authority to the contrary has been or can be cited by the Petitioners.

Tested by either the so-called state classification theory or the so-called corporate activities theory, the Debtor undoubtedly was an insurance company within the meaning of Section 4 of the Bankruptcy Act on and after January 1, 1941.[4] On December 31, 1940, the Debtor amended its charter so as to become an insurance company,[5] and on and after that date it did everything possible to become an insurance company, as distinguished from a face amount certificate company, for the announced purpose of avoiding compliance with the Investment Company Act of 1940. This was not, as contended by the Petitioners, merely an

[4] This point is developed more fully in the Wisconsin-Iowa brief.

[5] The facts as to the change in the Debtor's charter and the issuance to it of an insurance company license are more fully discussed in the Wisconsin-Iowa brief.

abortive effort at "extra judicial reorganization". The Investment Company Act of 1940 effectually ended the Debtor's career as an investment company issuing face amount certificates, because it was utterly impossible for the Debtor to comply with the regulatory provisions of that Act and of the complementary West Virginia statute (R. 367; Petitioners' Brief, p. 7). The Debtor, therefore, did not register under the provisions of Section 8 of the Investment Company Act (U. S. Code, Title 15, Sec. 80a-8), and never became a registered face amount certificate company. As an unregistered investment company it could not, after January 1, 1941,[6] issue new face amount certificates, or purchase or sell securities, or even service and receive payments on contracts issued prior to January 1, 1941.[7]

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[6] Section 7(a) of the Investment Company Act (U. S. Code, Title 15, Sec. 80a-7(a)):

"No investment company organized or otherwise created under the laws of the United States or of a State and having a board of directors, unless registered under section 80a-8, shall directly or indirectly—

(1) offer for sale, sell, or deliver after sale, by the use of the mails or any means or instrumentality of interstate commerce any security or any interest in a security, whether the issuer of such security is such investment company or another person; or offer for sale, sell, or deliver after sale any such security or interest, having reason to believe that such security or interest will be made the subject of a public offering by use of the mails or any means or instrumentality of interstate commerce;

(2) purchase, redeem, retire, or otherwise acquire or attempt to acquire, by use of the mails or any means or instrumentality of interstate commerce, any security or any interest in a security, whether the issuer of such security is such investment company or another person;

(3) * * *

(4) engage in any business in interstate commerce;

(5) * * *"

[7] Practically all of Debtor's business was in interstate commerce. The sending of notices, receipt of payments, etc., was handled by mail between the home office in West Virginia and contract holders in other states. Purchases and sales of securities were also transactions in interstate commerce.

It should also be noted that the Debtor's contracts, whether made before or after January 1, 1941, to the extent they were performed after that date, would be void under Section 46(b) of the Act (U. S. Code, Title 15, Sec. 80a-46(b)). This would operate to prevent the Debtor from receiving payments on its contracts unless it could become a registered company.

It was, therefore, not merely an attempt at "extra judicial reorganization" which prompted the Debtor to convert into an insurance company; it was also the realization that the only alternative was liquidation and dissolution.[8] As an insurance company, but only as an insurance company, the Debtor could transact new business and continue to receive payments on its contracts issued prior to January 1, 1941, because insurance companies were exempted from compliance with the Investment Company Act of 1940 and also the complimentary West Virginia statute.[9] Section 3(a)(2) of the Investment Company Act[10] defines an investment company as one engaging in the business of issuing face amount certificates, or which has been engaged in such business and has such certificates outstanding, but Section 3(c)(3)[11] provides that notwithstanding such definition an insurance company is not to be deemed an investment company. Consequently, as an insurance company the Debtor could continue to receive payments on its outstanding contracts without violating

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[8] One other possible alternative would have been to apply to the Securities and Exchange Commission for exemption under Section 6(c) (U. S. Code, Title 15, Sec. 80a-6(c)), but this obviously would have been a forlorn hope.

[9] The West Virginia statute is printed in full in the appendix to Petitioners' Brief, pp. 56-59.

[10] U. S. Code, Title 15, Sec. 80a-3(a)(2):

"(a) When used in this subchapter and sections 72(a), last sentence, and 107(f) of Title 11, 'investment company' means any issuer which—

(1) * * *

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; * * *."

[11] U. S. Code, Title 15, Sec. 80a-3(c)(3):

"(c) Notwithstanding subsections (a) and (b), none of the following persons is an investment company within the meaning of this subchapter and sections 72(a), last sentence, and 107(f) of Title 11:

(1) * * *

(2) * * *

(3) Any bank or insurance company; * * *."

the Investment Company Act. For this reason, among others, the Debtor became an insurance company on December 31, 1940.

As the Circuit Court of Appeals well stated: "Since the company deliberately assumed this new character to escape the requirements of the new federal and state statutes with respect to annuity companies, no weight should be given to the company's attempt to pose as an annuity company in the pending petition in bankruptcy". (R. 379)

Moreover, the Debtor was unquestionably an insurance company on and after January 1, 1941, even if we apply the definition of an insurance company as set out in Section 2(a)(17) of the Investment Company Act.[12] After that date it undoubtedly had an insurance company charter; it did write 9,802 insurance contracts; it issued no other new contracts whatsoever and its only other business activity was the servicing of contracts issued prior to January 1, 1941;[13] and it was under the supervision of the Insurance Commissioner of West Virginia.

It follows, therefore, that even if it could be said that the Investment Company Act of 1940 was applicable, the Debtor was an insurance company (and hence not an in-

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[12] U. S. Code, Title 15, Sec. 80a-2(a)(17):

"(a) When used in this subchapter and sections 72(a), last sentence, and 107(f) of Title 11, unless the context otherwise requires—

* * * * * * *

(17) 'Insurance company' means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such.

* * * * * *"

[13] As pointed out in the opinion of the Circuit Court of Appeals (R. 379), and as discussed more fully in the Wisconsin-Iowa brief, the servicing of these contracts constituted the transaction of an insurance business.

vestment company or face amount certificate company) as that term is defined in the Act, at the time of the filing of the petition in bankruptcy.

2.

Decision That Debtor Is An Insurance Company Does Not Present A Question Which Need Be Reviewed By This Court.

The question of whether or not the Debtor is an insurance company within the meaning of Section 4 of the Bankruptcy Act is discussed more in detail in the Wisconsin-Iowa brief. In this brief, however, we wish to point out that the question is not a question of federal law which has not been, but should be, settled by this Court, and the decision of the Circuit Court of Appeals on this point, therefore, does not present any ground for the review thereof by this Court.

The question is not one which, as contended by the Petitioners, is likely to recur frequently. As a matter of fact there are now and have been for a great many years only two other corporations in the United States engaged in the type of business conducted by the Debtor prior to December 31, 1940, but even that is beside the point here because the Debtor procured an insurance company charter on December 31, 1940, and radically changed its business activities on and after January 1, 1941. Neither of the other two face amount certificate companies have been so converted into insurance companies.

In addition, the Circuit Court of Appeals, while in general approving the so-called state classification rule as the controlling principle in determining the character of a corporation under Section 4 of the Bankruptcy Act, nevertheless did not rest its decision solely on that theory but instead held that under the facts of this case, the Debtor was an insurance company because *on and after January 1,*

1941, (1) it was classified as such by the State of West Virginia, (2) it was classified as such by most of the States of the United States, (3) its charter had been specifically amended so as to make it an insurance company, and (4) its business activities were those of an insurance company. It follows, therefore, that no matter whether the one rule or the other be a proper criterion, the decision of the Circuit Court of Appeals was, nevertheless, correct and would necessarily be affirmed by this Court even though this Court should hold the so-called state classification theory to be improper.

We should also like to point out that in the case, *In Re Union Guarantee and Mortgage Co.*, 75 Fed. (2) 984, precisely the same point as that here raised by the Petitioners was raised in a petition for certiorari filed on behalf of the Union Guarantee and Mortgage Co., but this Court denied certiorari in 296 U. S. 594. The arguments made by the Petitioners here are practically identical with the arguments made by the petitioner in the *Union Guarantee and Mortgage Co.* case, as will be seen from an examination of the petition and supporting brief filed in the latter case. There the lower court had held that the Union Guarantee and Mortgage Co. was an insurance company and the petition for certiorari made the point that this was a decision of an important question of federal law which had not been but should be settled by this Court, and further that the decision of the lower court in that case was in conflict with the decisions of this Court and in conflict with the decisions of other circuit courts of appeals. The same authorities relied upon by the petitioner in that case are relied upon by the Petitioners here, and yet this Court denied certiorari.

The same thing was true in the case of *In Re Prudence Co.*, 79 Fed. (2d) 77, cert. den., 296 U. S. 646, where the

lower court held that The Prudence Company was not an insurance company or a banking corporation. As a matter of fact, this Court has never granted a writ of certiorari to review a decision of the Circuit Court of Appeals holding that a corporation either was or was not an ir urance company, a banking corporation, or a building and loan association within the meaning of Section 4 of the Bankruptcy Act. So far as we are aware, this Court has denied certiorari in every instance in which such questions have been presented. *Gamble vs. Daniel*, 39 Fed. (2d) 447, cert. den. 282 U. S. 848; *Security Building & Loan Ass'n. vs. Spurlock*, 65 Fed. (2d) 768, cert. den. 290 U. S. 678; *In Re Peoria Life Insurance Co.*, 75 Fed. (2d) 777, cert. den. 296 U. S. 594.

3.

Prior Pending State Court Proceedings.

The Petitioners apparently recognize that the decision of the Circuit Court of Appeals to the effect that the interests of creditors would be best subserved in the prior pending state court proceedings is a decision of a question of fact rather than one of law, because they suggest that the federal question presented is an inquiry as to what are the considerations for determining when the prior state court proceedings best subserve the interests of creditors. We must say that we have considerable difficulty in following this reasoning.

Obviously whether or not prior pending state court proceedings best subserve the interests of creditors is a question of fact which must be determined upon a consideration of all the facts and circumstances in the particular case. It is not possible nor practicable nor desirable to attempt to limit or define just what facts should and what facts should not be considered in resolving this question,

any more than it is practicable or desirable to define fraud. All that can be said is that the court must consider *all* of the facts and circumstances disclosed by the record. Considerable judicial discretion is involved in the ultimate decision, but it, nevertheless, is a decision on a question of fact and not a decision on a question of law. What would best subserve the interests of creditors in one case may not best subserve their interests in another case.

In any event the question is not one of the kind which should be reviewed by this Court, and this Court has consistently refused to grant certiorari to review decisions of Circuit Courts of Appeals involving the issue of good faith in 77B or Chapter 10 proceedings. *In Re Bush Terminal Co.*, 84 Fed. (2d) 984, cert. den. 299 U. S. 596; *In Re 333 N. Michigan Avenue Building Corp.*, 84 Fed. (2d) 936, cert. den. 299 U. S. 602; *Texas Hotel Securities Corp. vs. Waco Development Co.*, 87 Fed. (2d) 395, cert. den. 300 U. S. 679; *First National Bank vs. Conway Road Estates Co.*, 94 Fed. (2d) 736, cert. den. 304 U. S. 578; *Price vs. Spokane Silver & Lead Co.*, 97 Fed. (2d) 237, cert. den. 305 U. S. 626; *In Re Mt. Forest Fur Farms of America*, 103 Fed. (2d) 69, cert. den. 308 U. S. 583.

In their brief (p. 45) the Petitioners suggest that the question here presented is also presented by the case of *In Re Marine Harbor Properties*, 125 Fed. (2d) 296, cert. granted, 86 L. Ed. (adv.) 729 (No. 24, October Term, 1942), and the case of *In Re Paloma Estates*, 126 Fed. (2d) 72, petition for certiorari filed May 12, 1942, and not yet acted upon. At the same time, the Petitioners further suggest that the disposition of these two cases will not necessarily determine the principles governing the disposition of the case at bar. We have carefully examined the petitions for certiorari and the briefs in each of these two cases and we respectfully submit that the questions presented in each

of them are entirely different from that presented by the Petitioners in the case at bar. In the *Marine Harbor Properties* case, the Circuit Court of Appeals for the Second Circuit dismissed the petition for reorganization on the ground that it was not filed in good faith because the Debtor had, some six years before, participated in a state court reorganization proceeding. As stated by the petitioner in his brief, "the question of good faith was resolved by the Circuit Court in terms of an alleged personal disqualification of the particular Debtor." An examination of the specification of errors urged by the petitioner there also discloses that the chief complaint was that the Circuit Court of Appeals for the Second Circuit had refused to determine whether or not the interests of creditors would be best subserved in the state court proceeding because of its holding that the debtor by reason of its participation in such proceeding was estopped from filing a petition for reorganization under Chapter 10. In the *Paloma Estates* case, the petitioner raised precisely the same question and contended that the decision of the Second Circuit Court of Appeals was again put upon the basis of a personal disqualification of the debtor by reason of its participation in a prior state court proceeding. However, the Respondents point out in their brief in opposition that the Second Circuit Court of Appeals did not base its decision upon this point alone, but proceeded to determine whether in fact the interests of creditors would be best subserved in the state court proceedings. They also point out that the dissenting judge in the Circuit Court of Appeals objected to the majority decision solely on the ground that the proof relied upon to show that the interests of creditors would be best subserved in the state court proceeding was in affidavit form and for that reason insufficient. The dissenting judge voted to remand the case so that further evidence could be adduced on the question of fact as to whether the

interests of creditors would be best subserved in the state court proceedings.

In the case at bar, the Circuit Court of Appeals has considered the voluminous evidence on this point and has reached the conclusion that the interests of the creditors would be best subserved in the prior pending state court proceeding. This decision on a question of fact is, therefore, quite different from the questions presented in the *Marine Harbor Properties* and *Paloma Estates* cases.

Point II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS AND THE APPLICABLE DECISIONS OF THIS COURT.

The Petitioners admit that there are no decisions of this Court on the question of what is an insurance company within the meaning of Section 4 of the Bankruptcy Act. They contend, however, that the decisions of this Court in *Bowers vs. Lawyers Mortgage Company*, 285 U. S. 182, and *United States vs. Home Title Insurance Company*, 285 U. S. 191, although dealing with the question of what is an insurance company within the meaning of Federal tax statutes, are nevertheless applicable in determining what is an insurance company under Section 4 of the Bankruptcy Act, and that the decision of the Circuit Court of Appeals on this question is in conflict with the decisions of this Court in those two cases. The Respondents here contend that the decisions in the *Bowers* and *Home Title Insurance Company* cases are not applicable in the present case but that even if they were, the decision of the Circuit Court of Appeals is not inconsistent therewith.

The *Bowers* and *Home Title Insurance Company* cases involved solely the question of whether the companies there involved were insurance companies within the mean-

ing of the Federal Capital Stock Tax Law and the Federal Income Tax Law. This Court said that a general definition of an insurance company was not necessary in order to determine whether *"having regard to the purpose of the classification and the considerations on which it probably was made"* the taxing statutes had classified the two companies there involved as insurance companies. Upon an examination of the considerations on which the classification had been made in the taxing statutes this Court held that the company in the first case was not an insurance company within the meaning of the taxing statutes but that the company in the second case was. Obviously those decisions have no bearing at all on the question of what is an insurance company within the meaning of Section 4 of the Bankruptcy Act. The considerations which prompted Congress to classify and exempt certain specified corporations in Section 4 of the Bankruptcy Act were entirely different from the considerations which prompted Congress in providing specially for the taxation of certain types of corporations. The Circuit Court of Appeals examined the purpose of the classification in the Bankruptcy Act and the considerations on which it probably was made, and concluded that the Debtor was an insurance company within the meaning of that Act.

Even if it were assumed that the decisions in the *Bowers* and *Home Title Insurance Company* cases were applicable in the present case, nevertheless the decision of the Circuit Court of Appeals in the present case is not inconsistent therewith. In the *Bowers* and the *Home Title Insurance Company* cases this Court held that, having regard to the purpose of the classification in the tax statute and the considerations upon which it was made, it was necessary to examine the corporate activities of the company in order to determine its character. This Court further held that

although the question of whether the company was formed under the state insurance laws was significant, it was not controlling. But if we apply these same tests to the Debtor, the conclusion is, nevertheless, that it was an insurance company at the time of the filing of the petition for reorganization because it not only was classified as an insurance company by the State of West Virginia and chartered and licensed under the insurance laws of that State, but its activities during the six months preceding the petition for reorganization were those of an insurance company. Consequently there is no inconsistency between the decision of the Circuit Court of Appeals and the above referred to decisions of this Court.

Point III.

THE CIRCUIT COURT OF APPEALS DID NOT DECIDE AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY WHICH WAS PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

As the Petitioners themselves admit, there are no applicable decisions of the courts of West Virginia as to whether the Debtor, or other companies like it, are to be considered as insurance companies. However, the contention is made that the statutes of West Virginia classified the Debtor as an investment company and not as an insurance company, and that the Circuit Court of Appeals erroneously applied these statutes. The fallacy of the contention is obvious because the Petitioners consider only the charter powers and activities of the Debtor prior to December 31, 1940, whereas the Circuit Court of Appeals in determining the classification of the Debtor as an insurance company under the laws of the State of West Virginia considered its charter powers and activities subsequent to January 1, 1941. Here again the Petitioners choose to ignore the change in the character of the Debtor's charter powers and

activities which occurred on and after January 1, 1941. But the character of the Debtor at the time of the filing of the petition for reorganization is controlling, and it is not possible to ignore the last six months of its existence and consider only its charter powers and corporate activities prior to that time.

The lower court has thus not misapplied the applicable statutes of West Virginia.

POINT IV.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

1.

The Decision That The Debtor Is An Insurance Company Is Not In Conflict With Decisions In Other Circuits.

A superficial examination of the authorities might seem to indicate a conflict among the various circuit courts of appeals as to the principles to be applied in determining whether or not a particular corporation is one of those excepted from the provisions of the Bankruptcy Act under Section 4 thereof, but we believe a more careful analysis of the decisions will show that actually this is not the case.[14]

We wish to point out, however, that regardless of whether there might appear to be a conflict among the various circuit courts of appeals as to the application of the so-called state classification theory, the so-called charter power theory, or the so-called business activities theory, nevertheless this is not a case in which this Court can resolve any such supposed conflicts. Although the Circuit Court of Appeals in this case in general approved the so-called state classification theory, it, nevertheless, held that

[14] This point is discussed more in detail in the Wisconsin-Iowa brief.

no matter which theory is applied, the Debtor must be regarded as an insurance company since, (1) it was an insurance company under the laws of the State of West Virginia and under the laws of the States generally, (2) it had the charter powers of an insurance company, and (3) its activities during the six months prior to the filing of the petition for reorganization were those of an insurance company. As pointed out by the Circuit Court of Appeals in its opinion (R. 372), the Debtor would be classified as an insurance company even if the rule of classification approved by the District Court were followed because, although neither of the Petitioners herein had seen fit to bring the matter to the attention of the District Court, it later developed and is now admitted that the Debtor actually issued 9802 insurance contracts subsequent to January 1, 1941. (R. 339-352, 361-362).

2.

The Circuit Court Of Appeals Did Not Pass On The Question Of Whether Or Not "Slow And Orderly Liquidation" Is A Method Of Reorganization.

The Circuit Court of Appeals decided it was not reasonable to expect that a plan of reorganization of the Debtor as a going concern could be effected, and the Petitioners argue that in so deciding the Circuit Court of Appeals held that "slow and orderly liquidation" in the Federal Court was not reorganization within the meaning of Chapter 10 of the Bankruptcy Act. They then undertake to point out that such decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts of appeals in several other cases cited. We do not concede that the cases cited are applicable, but without arguing the question of whether reorganization includes "slow and orderly liquidation" we think it sufficient merely

to point out that the question was not decided by the Circuit Court of Appeals and, therefore, is not presented to this Court on the record.

The Circuit Court of Appeals held, largely on the basis of findings of fact of the District Court, that it was clearly not feasible to rehabilitate the Debtor as a going concern. The Court referred to the fact that this was virtually conceded by the District Court and by the Debtor, the Trustee, and the Securities and Exchange Commission, and it pointed out that the only suggestion made by these parties was that it was feasible to have a "slow and orderly liquidation" in the Federal Court, and that such a "slow and orderly liquidation" was a method of reorganization within the meaning of Chapter 10 of the Bankruptcy Act. The Circuit Court of Appeals clearly did not pass on the question of whether a "slow and orderly liquidation" was a method of reorganization, but, instead, held (1) that the record did not justify the conclusion that it was reasonable, or feasible, or desirable to have a "slow and orderly liquidation" in the Federal Court, and (2) that since liquidation was inevitable, the question then arose as to whether the interests of the creditors would be best subserved by such a liquidation in the Federal Court, or by liquidation in the state courts (R. 381-384). After reviewing all of the circumstances, the Circuit Court of Appeals decided in favor of the latter (R. 384-387).

There is, therefore, no conflict between the decision of the Circuit Court of Appeals and the decisions of other circuit courts of appeals cited by the Petitioners which they contend hold that "slow and orderly liquidation" is a method of reorganization, because there has been no decision on this question by the Circuit Court of Appeals.

CONCLUSION.

We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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